

Tropiland Sdn Bhd v Majlis Perbandaran Seberang Perai

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24-718-93
VINCENT NG J
20 NOVEMBER 1995

Public Authorities — Building control — Issuance of occupation certificate of fitness — Whether pre-conditions imposed for issuance of certificate of fitness were Wednesbury reasonable — Whether requirement to complete construction of monsoon drain in presence of squatters reasonable — Whether duty of public authority to make land available for construction

Administrative Law — Judicial remedies — Judicial review — Public authority — Principles for judicial review where public body commits tortious act

Public Authorities — Remedies — Damages — Extent to which damages can be claimed against public authority for unlawful administrative act — Whether application for damages can be included in application for judicial review — Whether court will allow claim for damages if public body acted ultra vires — Whether ultra vires act was in bad faith, malice or conscious abuse

The plaintiff company ('the plaintiffs') was the registered proprietor of a piece of land known as Lot Nos 368-370, Mukim 15, Jalan Telaga Ayer, Pulau Pinang ('the land'). The plaintiffs had completed construction of a five-storey building on the land in late May 1991. They had already been issued with a certificate of practical completion from their architect on 31 May 1991. The plaintiffs went on to apply for the occupation certificate of fitness ('the OCF') on 9 July 1991. The defendants rejected the plaintiffs' application. The reasons given by the defendants were the non-compliance by the plaintiffs with certain prerequisite conditions, namely, (a) the completion of the remaining 20% of reconstruction and upgrading of the monsoon drain on state land notwithstanding the presence of unauthorized or illegal occupiers; and (b) the construction of a concrete perimeter drain along the eastern and southern boundary of the land under development, which did not appear in the amended layout plan ('CAB 3'). The plaintiffs contended that there was no justification for the defendants to require the plaintiffs to complete reconstruction and upgrading on the monsoon drain as that portion of land was occupied by squatters. It was the responsibility of the defendants to make that portion of land vacant and available to enable the plaintiffs to complete the balance of 20% construction works on the monsoon drain. Further, the concrete perimeter drain was not a condition stipulated in CAB 3 as the only drain required by CAB 3 was the building drain running along the building proper. Therefore, having approved CAB 3 without the previous condition stipulated in the earthworks plan ('CAB 2'), the defendants should not overlook the condition in CAB 3 and impose new requirements on the plaintiffs.

A Therefore, the plaintiffs brought an action to the High Court and
prayed for (i) a declaration that the defendants were not justified in
the exercise of discretion to require the plaintiffs to construct the
perimeter drain along the boundary of the land before the issuance of
the OCF; (ii) a declaration that the defendants were not justified in
the exercise of discretion to require the plaintiffs to complete the
B construction of the monsoon drain notwithstanding the presence of
the squatters; and (iii) damages in respect of the loss and damages
suffered due to the refusal to issue the OCF.

C **Held**, allowing the declarations prayed for by the plaintiffs and
ordering damages to be paid by the defendants:

(1) The defendants' insistence that the plaintiffs complete the
reconstruction and upgrading of the monsoon drain in the presence
of squatters was wholly unwarranted and without any basis in law.
The requirement was unjustified as the defendants knew fully
D well that the plaintiffs had no standing in law to evict squatters
from state land. Further, the requirement was so unfair,
unreasonable and impossible to perform, as to go beyond anything
intended by the provisions of the Act. Such unreasonableness fell
within the ambit of the definition of 'so unreasonable' laid down
under the *Wednesbury* principle. A local authority must act in a
manner which does not offend against common sense. In fact, it was
E the bounden duty of the defendants to make the state land available
for the completion of the construction of the monsoon drain (see
pp 27C-F, 29B-C and 30C-F; *Sidek bin Haji Muhammed & Ors v*
Govt of the State of Perak & Ors [1982] 1 MLJ 313; *Associated*
Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB
F 223; *Dorset Yacht Co v Home Office* [1970] AC 1004; [1970] 2
All ER 294; [1970] 2 WLR 1140 and *Pengarah Tanah dan*
Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd
[1979] 1 MLJ 135 followed).

G (2) It was also wholly impermissible in law and without any
justification to hold that the requirement in CAB 2 pertaining to
the construction of a perimeter drain should be read into or in
conjunction with CAB 3. Considering that a local authority has
ample and wide powers under s 22(3) of the Town and Country
Planning Act 1976 ('the Act') to impose such 'conditions as it
deems fit' when granting planning permission, it would be wholly
H unfair and unjust to allow them to impose fresh conditions
especially at the stage of issuance of the OCF, and after the
developer had already incurred considerable construction expense.
Therefore, the defendant's requirement that the monsoon drain,
which was not in CAB 3, be constructed, as a condition for the
I issuance of the OCF was not justified in law and was ultra vires
the Act (see pp 30G and 32E-G; *Rethina Development Sdn Bhd v*
Majlis Perbandaran Seberang Perai, Butterworth [1990] 2 MLJ 111
followed).

- (3) Due to a lapse of such long period between the respective approvals of CAB 2 and CAB 3, it would not be unreasonable for the plaintiffs to presume that CAB 3 superseded CAB 2 and was the final and the sole reference planning permission under the Act. Also, the very approval of CAB 3 presupposed the acceptance by the defendants that the earthworks had been completed in accordance with CAB 2. Consequently, its absence would indicate that such drain was not a requirement in the development of a five-storey building, though it may have been a requirement in respect of the originally intended 11-storey building. In law, it was CAB 3 and the conditions indorsed therein and not CAB 2 that constituted the planning permission. Further, the construction of the proposed concrete perimeter drain would create an absurdity, as such drain would run parallel along the center of the 40 ft proposed road to be constructed by the plaintiffs and the public works department (see pp 30H-I and 31A-H). A B C
- (4) It was trite law that challenges based on distinct principles of public law or general issues of law unconnected with the specific statutory code may be dealt with by judicial review. The courts will usually allow judicial review where an applicant raises an arguable case that a public body has acted for an improper purpose, or has acted unfairly, or raises the general question of the extent to which representation can bind public bodies. Public bodies, like private individuals, are capable of committing tortious acts with the same principles generally applicable. A public body which commits an ultra vires act, either maliciously or knowing that the act is ultra vires, may be liable in tort (see p 33A-D; *R v IRC ex p Preston* [1985] AC 835; [1985] 2 All ER 327; [1985] 2 WLR 836 and *R v IRC, ex p MFK Underwriting Agencies* [1990] 1 All ER 91; [1990] 1 WLR 1545 followed). D E F
- (5) A claim for damages may be included in an application for judicial review. Such a claim can only be made in addition to a claim for the prerogative remedies or a declaration or injunction; a claim for damages cannot be made in isolation. There were now clear indications that the courts will not award damages against public authorities merely because they have made some order which turns out to be ultra vires, unless there is bad faith or malice or conscious abuse. However, the courts have been prepared to find that there was bad faith and to award damages if an authority has manifestly and gravely disregarded the limits on the exercise of its powers with resultant loss, in which case damages is the logical remedy for loss caused by unlawful administrative action (see pp 33D-E and 34G-I; *Dunlop v Woolahra Municipal Council* [1982] AC 158; [1981] 1 All ER 1202; [1981] 2 WLR 693 followed). G H I
- (6) The defendants had by their conduct shown bad faith in refusing to issue the OCF as they knew or should have known that they

A did not possess the power to make the two requirements. The admitted facts would unfortunately leave an irresistible impression in the court's mind that rather than abiding by the layout plan that they themselves had approved, they had unseemingly attempted to rely on their administrative clout, through non-issuance of the OCF, to justify what may have been misapproved.

B Such reliance on their administrative clout was definitely tantamount to bad faith or malice on their part. Therefore, damages was ordered to be paid upon assessment by the senior assistant registrar (see pp 35H-I and 36A).

C **Per curiam:**

- D (1) To require that CAB 2 be read in conjunction with CAB 3, would run foul of ss 91 and 92 of the Evidence Act 1950 and established authorities. Also, as there was no ambiguity or defects in CAB 3, and even if there was such defect or ambiguity, s 93 of the Evidence Act 1950 would exclude extrinsic evidence to amend or explain such document. Indeed, only the intentions as expressed in CAB 3 may be construed (see pp 31I and 32A; *Goh Eng Wah v Yap Phooi Yin & Anor* [1985] 1 MLJ 329 followed; *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 and *Keng Huat Film Co Sdn Bhd v Makhanlall (Prop) Pte Ltd* [1984] 1 MLJ 243 followed).
- E (2) Section 70A(5) of the Street, Drainage and Building Act 1974 was inapplicable as it was never contended that earthworks had not been completed (see p 32B-C).

F **[Bahasa Malaysia summary]**

G Syarikat plaintif ('plaintif') adalah tuan punya berdaftar sebidang tanah yang dikenali sebagai Lot No 368-370, Mukim 15, Jalan Telaga Ayer, Pulau Pinang ('tanah itu'). Plaintif telah menyelesaikan pembinaan sebuah bangunan lima tingkat di atas tanah itu pada penghujung bulan Mei 1991. Mereka telah pun menerima sijil penyudahan praktikal dari jurubina pada 31 Mei 1991. Plaintif seterusnya memohon sijil kelayakan penghunian ('SKP itu') pada 9 Julai 1991. Defendan menolak permohonan plaintif. Alasan-alasan yang diberi oleh defendan adalah kegagalan plaintif untuk mematuhi prasyarat-prasyarat tertentu, iaitu, (a) penyudahan baki 20% kerja untuk pembinaan semula dan peningkatan taraf longkang monsun di atas tanah kerajaan negeri tidak kira kehadiran setinggan; dan (b) pembinaan longkang keliling konkrit sepanjang sempadan timur dan selatan tanah itu, yang tidak terdapat di dalam pelan susun atur pindaan ('CAB 3'). Plaintif menegaskan bahawa tiada justifikasi bagi defendan menghendaki plaintif menyiapkan kerja pembinaan semula dan peningkatan taraf longkang monsun tersebut kerana bahagian tanah yang terlibat diduduki oleh setinggan. Adalah menjadi tanggungjawab defendan untuk memastikan tanah tersebut dikosongkan supaya plaintif boleh menghabiskan baki 20% kerja

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pembinaan longkang monsun itu. Tambahan pula, longkang keliling konkrit bukannya syarat yang dinyatakan dalam CAB 3 kerana longkang yang dikehendaki dalam CAB 3 hanyalah longkang bangunan yang dibina mengelilingi bangunan itu. Maka, selepas meluluskan CAB 3 tanpa syarat dahulu yang ditetapkan dalam plan kerja tanah ('CAB 2'), defendan tidak boleh membenarkan syarat dalam CAB 3 melepasi perhatian mereka dan mengenakan syarat baru ke atas plaintif.

Oleh itu, plaintif membawa tindakan di Mahkamah Tinggi dan memohon untuk (i) satu deklarasi bahawa defendan tidak mempunyai asas dalam menjalankan budi bicara menghendaki plaintif membina semula longkang keliling sepanjang sempadan tanah itu sebelum pengisuan SKP itu; (ii) satu deklarasi bahawa defendan tidak mempunyai asas dalam menjalankan budi bicara menghendaki plaintif menyempurnakan pembinaan longkang monsun itu tidak kira kehadiran setinggi itu; dan (iii) ganti rugi untuk kehilangan dan kerugian yang dialami kerana keengganan mengisui SKP itu.

Diputuskan, membenarkan deklarasi-deklarasi yang dipohon oleh plaintif dan mengarahkan ganti rugi dibayar oleh defendan:

- (1) Tindakan defendan berkeras supaya plaintif menyempurnakan pembinaan semula dan peningkatan taraf longkang monsun dengan kehadiran setinggi adalah pada keseluruhannya tidak wajar dan tidak berasas undang-undang. Keperluan itu tidak berjustifikasi kerana defendan mengetahui sepenuhnya bahawa plaintif tidak mempunyai kuasa di bawah undang-undang untuk mengusir setinggi daripada tanah kerajaan negeri. Lagipun, syarat itu begitu tidak adil, tidak munasabah dan mustahil untuk dilaksanakan, sehingga terkeluar daripada apa-apa yang diniatkan oleh peruntukan dalam Akta itu. Keadaan tidak munasabah itu jatuh dalam lingkungan definisi 'begitu tidak munasabah' mengikut 'prinsip *Wednesbury*'. Pihak berkuasa tempatan mesti bertindak dengan cara yang tidak menyinggung akal budi. Sememangnya, adalah kewajipan defendan untuk mengosongkan tanah kerajaan negeri itu supaya kerja membina longkang monsun itu boleh dihabiskan (lihat ms 27C-F, 29B-C dan 30C-F; *Sidek bin Haji Muhamed & Ors v Govt of the State of Perak & Ors* [1982] 1 MLJ 313; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *Dorset Yacht Co v Home Office* [1970] AC 1004; [1970] 2 All ER 294; [1970] 2 WLR 1140 dan *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 diikuti).
- (2) Adalah pada keseluruhannya tidak dibenarkan di bawah undang-undang dan tanpa justifikasi untuk memutuskan bahawa keperluan dalam CAB 2 berkaitan dengan pembinaan longkang keliling patut dibaca ke dalam atau bersama dengan CAB 3. Memandangkan yang pihak berkuasa tempatan mempunyai kuasa yang meluas di bawah s 22(3) Akta Perancangan Desa dan Bandar

- A 1976 ('Akta itu') untuk mengenakan 'syarat yang dianggap patut' apabila memberi kebenaran perancangan, adalah tidak saksama dan tidak adil untuk membenarkan mereka mengenakan syarat-syarat baru terutamanya di peringkat pengisuan SKP itu, dan selepas pemaju telah menanggung perbelanjaan pembinaan yang banyak.
- B Maka, keperluan defendan supaya longkang monsun, yang tidak dinyatakan dalam CAB 3, dibina, sebagai syarat untuk mengisua SKP itu tidak berasas di bawah undang-undang dan adalah ultra vires Akta itu (lihat ms 30G dan 32E-G; *Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai*, Butterworth [1990] 2 MLJ 111 diikuti).
- C (3) Disebabkan berlalunya masa yang panjang di antara kelulusan CAB 2 dan CAB 3 itu, adalah tidak munasabah untuk plaintif membuat anggapan bahawa CAB 3 menggantikan CAB 2 dan adalah kebenaran muktamad dan satu-satunya kebenaran perancangan rujukan di bawah Akta itu. Juga, kelulusan CAB 3 mengandaikan penerimaan oleh defendan bahawa kerja tanah telahpun dilaksanakan mengikut CAB 2. Oleh itu, ketiadaannya akan menunjukkan bahawa longkang sedemikian bukanlah keperluan untuk pembangunan bangunan lima tingkat itu, walaupun ianya mungkin menjadi satu keperluan untuk bangunan 11 tingkat yang pada awalnya dirancang dibina di situ. Di bawah undang-undang, CAB 3 dan syarat-syarat di dalamnya, dan bukannya CAB 2, merupakan kebenaran perancangan. Lebih-lebih lagi, pembinaan longkang keliling konkrit itu adalah suatu yang tidak munasabah, kerana longkang sedemikian akan dibina selari di tengah cadangan jalan 40 kaki yang akan dibina oleh plaintif dan jabatan kerja raya (lihat ms 30H-I dan 31A-H).
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- F (4) Telah begitu biasa dikatakan bahawa cabaran berasaskan prinsip undang-undang awam atau isu am undang-undang yang tidak berkait dengan mana-mana kanun statutori yang tertentu boleh diuruskan dengan kajian semula kehakiman. Mahkamah selalunya membenarkan kajian semula kehakiman di mana pemohon membangkitkan kes yang dapat dihujah bahawa sesuatu badan awam telah bertindak untuk tujuan yang tidak patut, atau telah bertindak secara tidak adil, atau membangkitkan persoalan am mengenai tahap representasi yang boleh mengikat badan-badan awam itu. Badan-badan awam, seperti orang perseorangan, boleh melakukan perbuatan tort mengikut prinsip-prinsip am yang sama. Badan awam yang melakukan perbuatan ultra vires, dengan niat jahat atau dengan mengetahui bahawa tindakan itu ultra vires, boleh bertanggungjawab di bawah tort (lihat ms 33A-D; *R v IRC ex p Preston* [1985] AC 835; [1985] 2 All ER 327; [1985] 2 WLR 836 dan *R v IRC, ex p MFK Underwriting Agencies* [1990] 1 All ER 91; [1990] 1 WLR 1545 diikuti).
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- I (5) Tuntutan untuk ganti rugi boleh dimasukkan dalam permohonan untuk kajian semula kehakiman. Tuntutan untuk ganti rugi itu hanya boleh dibuat sebagai tambahan kepada tuntutan remedi

prerogatif atau deklarasi atau injunksi; tuntutan ganti rugi tidak boleh dibuat secara bersendirian. Terdapat petunjuk jelas bahawa mahkamah tidak akan memberikan ganti rugi terhadap badan awam hanya kerana mereka membuat arahan yang kesudahannya ultra vires, kecuali jika terdapat niat jahat atau penyalahgunaan yang disedari. Walau bagaimanapun, mahkamah bersedia untuk mendapati bahawa terdapat niat jahat dan mengaward ganti rugi jika badan berkuasa itu secara jelas dan serius tidak mengendahkan had ke atas penggunaan kuasanya yang berkesudahan dengan kehilangan, dan dalam keadaan itu ganti rugi adalah remedi yang logik untuk kehilangan yang berlaku akibat tindakan pentadbiran yang tidak sah itu (lihat ms 33D-E dan 34G-I; *Dunlop v Woolahra Municipal Council* [1982] AC 158; [1981] 1 All ER 1202; [1981] 2 WLR 693 diikuti).

- (6) Defendan melalui tindakan mereka menunjukkan niat jahat dalam keengganan mereka untuk mengisukan SKP itu kerana mereka tahu atau patut tahu bahawa mereka tidak mempunyai kuasa untuk membuat kedua-dua syarat itu. Fakta yang diakui oleh defendan telah meninggalkan kesan yang mendalam pada fikiran mahkamah bahawa daripada mengikut rancangan susun atur yang telah diluluskan oleh mereka sendiri, sebaliknya mereka rela berusaha menggunakan pengaruh pentadbiran, melalui keengganan mengisui SKP itu, untuk memberi justifikasi kepada apa yang mungkin telah diluluskan secara salah. Pergantungan pada pengaruh pentadbiran itu sememangnya berjumlah kepada niat jahat pada pihak mereka. Maka, ganti rugi patut dibayar setelah ditaksirkan oleh penolong kanan pendaftar (lihat ms 35H-I dan 36A).

Per curiam:

- (1) Keperluan CAB 2 dibaca bersama dengan CAB 3, adalah bertentangan dengan ss 91 dan 92 Akta Keterangan 1950 dan autoriti yang sudah mantap. Juga, oleh kerana tidak ada ketidaktentuan atau kecacatan dalam CAB 3, dan biarpun terdapat apa-apa ketidaktentuan atau kecacatan, s 93 Akta Keterangan 1950 akan mengetepikan keterangan ekstrinsik untuk membetulkan atau menerangkan dokumen sedemikian. Sesungguhnya, hanya niat seperti yang dinyatakan dalam CAB 3 dapat digunakan (lihat ms 31I dan 32A; *Goh Eng Wah v Yap Phooi Yin & Anor* [1985] 1 MLJ 329; *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 dan *Keng Huat Film Co Sdn Bhd v Makhanlall (Prop) Pte Ltd* [1984] 1 MLJ 243 diikuti).
- (2) Seksyen 70A(5) Akta Jalan, Parit dan Bangunan 1974 tidak boleh dipakai kerana tidak pernah dipertikaikan bahawa kerja tanah masih belum dihabiskan (lihat ms 32B-C).]

[Editorial note: The defendants have appealed to the Court of Appeal vide Civil Appeal No P-02-11-96.]

A Notes

For a case on building control, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1386.

For cases on remedies in respect of public authorities, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1421-1429.

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For cases on tort in respect of public authorities, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1434-1452.

For cases on judicial remedies in administrative law, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 83-95.

Cases referred to**C**

Associated Provincial Picture Houses v Wednesbury Corp [1948] 1 KB 223

Booth & Co v National Enterprise Board [1978] 3 All ER 624

Chaplin v Hicks [1911] 2 KB 786

Cutler v Wandsworth Stadium Ltd [1949] AC 398; [1949] 1 All ER 544

D

Dawson & Co v Bingley Urban District Council [1911] 2 KB 149

Dorset Yacht Co v Home Office [1970] AC 1004; [1970] 2 All ER 294; [1970] 2 WLR 1140

Dunlop v Woollahra Municipal Council [1982] AC 158; [1981] 1 All ER 1202; [1981] 2 WLR 693

E

Ferguson v Kinnoull (Earl) (1842) 9 Cl & Fin 251

Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor [1985] 2 MLJ 380

Goh Eng Wah v Yap Phooi Yin & Anor [1985] 1 MLJ 329

Hall & Co Ltd v Shoreham-By-Sea Urban District Council [1964] 1 WLR 240

F

Keng Huat Film Co Sdn Bhd v Makhanlall (Prop) Pte Ltd [1984] 1 MLJ 243

Letchumi Ammal v Nam Fong Housing Sdn Bhd [1982] 2 MLJ 19

Micosta SA v Shetland Islands Council [1984] 2 Lloyd's Rep 525

Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135

G

Pickering v James (1873) LR 8 CP 489

R v Hillingdon London Borough Council, ex p Royco Homes Ltd [1974] QB 720

R v IRC, ex p MFK Underwriting Agencies [1990] 1 All ER 91; [1990] 1 WLR 1545

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R v IRC, ex p Preston [1985] AC 835; [1985] 2 All ER 327; [1985] 2 WLR 836

R v Secretary of State for the Environment, ex p Ostler [1976] 3 WLR 288

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Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai, Butterworth [1990] 2 MLJ 111

Sidek bin Haji Muhamed & Ors v Govt of the State of Perak & Ors [1982] 1 MLJ 313

Thornton v Kirklees Metropolitan Borough Council [1979] QB 626; [1979] 3 WLR 1

Legislation referred to

Evidence Act 1950 ss 91, 92, 93

Rules of the High Court 1980 O 53

Street, Drainage and Building Act 1974 s 70A(5)

Town and Country Planning Act 1976 ss 22(3), 25(1), (2)

Cinematography Act 1909 [Eng]

Sunday Entertainments Act 1932 s 1(1) [Eng]

JA Yeoh (Christina Siew with him) (Shearn Delamore & Co) for the plaintiff.

CV Prabhakaran (Mansor Hashim with him) (Prabha & Assoc) for the defendant.

Vincent Ng J: By this application (encl 1) the plaintiff company ('the plaintiffs'), which is the registered proprietor of a piece of land known as Lot Nos 368-370, Mukim 15, Jalan Telaga Ayer, Pulau Pinang ('the said land'), had sought several declarations against the defendants ('MPSP') pertaining to late issuance of the occupation certificate of fitness ('the OCF') for a five-storey building which the plaintiffs had completed construction on 31 May 1991.

The declarations and reliefs originally sought in their original claim were as follows:

- (1) a declaration that the defendants are not entitled in law nor justified in the exercise of discretion in the circumstances to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of a block of five-storey building ('the said building') on the plaintiffs' land known as Lots 368-370, Mukim 15, Jalan Telaga Ayer, Butterworth ('the said land'), to pay a sum of RM186,725 or a reduced sum of RM 120,707.50 as contribution to the sewerage connection from the said land to the defendants' trunk sewer;
- (2) a declaration that the defendants are not entitled in law nor justified in the exercise of discretion in the circumstances to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of the said building on the said land, to construct an upstream culvert/monsoon drain across Jalan Telaga Ayer;
- (3) a declaration that the defendants are not entitled in law nor justified in the exercise of discretion in the circumstances to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of the said building on the said land, to construct a perimeter drain along the eastern and southern boundary of the said land;
- (4) a declaration that the defendants are not entitled in law nor justified in the exercise of discretion in the circumstances to require the plaintiffs, as a condition for the issuance of an occupation certificate in respect of the said building on the said land, to complete the construction of the monsoon drain on state land notwithstanding the presence of unauthorized and/or illegal structures on the state land;
- (5) damages to be assessed by the senior assistant registrar of the High Court in respect of the loss and damage suffered by the plaintiffs on account of the defendants' failure and/or refusal to date to issue an occupation certificate in respect of the said building on the said land;

- A (6) such further and/or other reliefs as the circumstance of the case may require and which this honourable court deems necessary or just; and
(7) costs to be paid by the defendants.

This originating summons was supported by the affidavits of Choo Ah Beng, the managing director of the plaintiff company, affirmed on 17 August 1993 (encl 2) and 16 March 1995 (encl 9), and opposed by an affidavit-in-reply of Choo Ewe Guan, affirmed on 30 October 1993 (encl 7), and the affidavit of Md Pilus bin Md Noor, affirmed on 30 March 1995.

On 22 February 1994, the plaintiff's counsel, Mr JA Yeoh, withdrew prayers 1 and 2 of encl 1.

- C In encl 2, the earthworks plan in respect of an 11-storey building approved on 19 July 1986 was exhibited as exh 'CAB 2', the roads and drainage plans approved on 26 November 1990, as 'CAB 11', the layout plan approved on 30 November 1985 pertaining to an 11-storey building, as 'CAB 1', and the current amended layout plan in respect of the said 5-storey building approved on 30 November 1988, as exh 'CAB 3'.

- D The plaintiffs' architect had on 31 May 1991 issued a certificate of practical completion ('CAB 12'). The plaintiffs had on 9 July 1991, following the completion of construction of the said five-storey building and the issuance of the CAB 12, through their architect applied (application marked 'CAB 13') to the defendants for an OCF in respect of the said five-storey building. The defendants had by their letter dated 15 January 1992 ('CAB 14') rejected the plaintiffs' application for the OCF and requested the plaintiffs to comply with certain conditions stated therein, which the parties have now agreed concerns only two conditions, namely:

- E (a) The completion of the remaining 20% of reconstruction and upgrading of the monsoon drain on state land notwithstanding the presence of unauthorized or illegal occupiers.
(b) The construction of a concrete perimeter drain along the eastern and southern boundary of the land under development, which does not appear in CAB 3.

- G The common ground between the parties are as follows:

- H (1) Under s 22 of the Town and Country Planning Act 1976 ('the Act'), the local planning authority may grant planning permission, either absolutely or subject to such conditions *as it thinks fit to impose*, or may refuse to grant planning permission.
I (2) A layout plan is essentially the 'planning permission' under the Act which deals with drains, infrastructure, building set-back, outlay of other adjoining lands and roads.
(3) The concrete perimeter drain is shown or drawn in CAB 2, but not in CAB 3 or in CAB 11, and also neither CAB 3 nor CAB 11 contained any expressed conditions requiring the construction of a concrete perimeter drain.
(4) However, the monsoon drain clearly appears drawn into CAB 11 and CAB 3 as a requirement for reconstruction and upgrading according to MPSP requirements.

- (5) There are no words expressed or implied in the printed conditions in CAB 3 which indicated a cross-reference to CAB 2 pertaining to the construction of a concrete perimeter drain. Thus, CAB 3 was approved without any conditions subjecting it to compliance with CAB 2 pertaining to the concrete perimeter drain. A
- (6) CAB 2 was approved on 19 July 1986 in respect of a proposed 11-storey building (not a five-storey building), it was the only earthworks plan ever approved by the authorities in respect of the plaintiffs' project. And, CAB 3 was approved two years and four months after the approval of CAB 2, and indeed the earthworks under CAB 2 had been completed about 11 months before CAB 3 was approved. B
- (7) Reconstruction and upgrading of 80% of the monsoon drain has been completed and the whole of works in respect of the monsoon drain involved state land, part of which would entail the shifting of squatters in occupation. The reconstruction and upgrading of the remaining 20% of the monsoon drain had been held up due to the presence of such squatters on state land and at all material times they have not been cleared. C D
- (8) There has never been any revocation or modification of CAB 3 by MPSP pursuant to s 25(1) and in accordance with s 25(2) of the Act, to validate same.
- (9) It is not the case of the defendants that they had given any or sufficient assistance to the plaintiffs in clearing the squatters. The plaintiffs have no standing in law to evict squatters from the state land, and the reconstruction or upgrading of the monsoon drain as per its alignment drawn on CAB 3, would involve the shifting of such squatters occupying the land in respect of the uncompleted 20% of the upgrading of this drain. E F
- (10) In the event that either of the two conditions in (a) and (b) above is imposed legally and justifiably, then the MPSP would have every right to withhold the issuance of the OCF.

In respect of condition (a) above, the plaintiffs had contended that the defendants are not justified to require the plaintiffs to complete the reconstruction and upgrading of the monsoon drain in respect of that portion which is occupied by squatters in illegal structures as a condition for the issuance of OCF, since it is the responsibility of the defendants to make that portion of the land vacant and available to the plaintiffs so as to enable the plaintiffs to complete the balance 20% of the reconstruction and upgrading of the monsoon drain. G H

In respect of condition (b), the plaintiffs had contended that the construction of a concrete perimeter drain is not a condition of the amended layout plan (CAB 3), being the planning permission under the the Act. The only drain required in CAB 3 is the building drain running along the building proper. Thus, having approved CAB 3 without any indication of such concrete perimeter drain the defendants cannot now go behind those conditions as endorsed in CAB 3, to impose the requirement I

- A which is not a condition imposed by the defendants as a local planning authority when granting planning permission.

On the question of the plaintiffs first contention — the monsoon drain:

- B I hold that upon the admitted facts, clearly, the defendants' insistence that the plaintiffs complete the reconstruction and upgrading of the monsoon drain in the teeth of the presence of squatters is wholly unwarranted and without any basis in law. It has never been the contention of the defendants that it was not theirs but the plaintiffs' duty to rid the squatters from state land. The plaintiffs had completed 80% of the upgrading and reconstruction, and it cannot be justified to require them, as a condition for the issuance of OCF, to complete upgrading the balance 20% which is at all material times, to the defendants knowledge, occupied by squatters in illegal structures. The requirement is even more unjustified as the defendants know fully well that the plaintiffs had no standing in law to evict squatters from state land, and thereby in effect putting the plaintiffs on a collision course against the squatters. (See *Sidek bin Haji Muhamed & Ors v Govt of the State of Perak & Ors* [1982] 1 MLJ 313.) The requirement is, in view of the admitted impediment, so unfair, unreasonable and impossible to perform, as to go beyond anything intended by the provisions of the Act, such unreasonableness as would bring it within the ambit of the definition of 'so unreasonable' laid down under the '*Wednesbury principle*', which was expounded in the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

- F In the *Wednesbury* case, the English court was concerned with s 1(1) of the Sunday Entertainments Act 1932, whereby an authority having power in any area to grant licences for cinematograph performances under the Cinematograph Act 1909, was given power to allow a licensed place to be open and used on Sundays, 'subject to such conditions as the authority thinks fit to impose'.

- G When the local authority granted to the plaintiffs therein a licence for Sunday cinematograph performances subject to the condition that no children under 15 years of age should be admitted to such performances with or without an adult, the plaintiffs brought an action for a declaration that the condition was ultra vires and unreasonable

- H The proviso in the Sunday Entertainments Act 1932, 'subject to such conditions as the authority think fit to impose' is similar to the expression used in s 22(3) of the (our) Act. In that case, it was held that the legislature could not have intended to leave the conditions to be imposed at large by the local authority, and the '*Wednesbury principle*' was very aptly articulated by Lord Greene MR at pp 233-234, thus:

- I I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought

to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

As for the rationale of this dicta, I could do no better than, again, to quote the words of Lord Greene at p 228:

The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority ... it must always be remembered that the court is not a court of appeal.

Wednesbury Corp was cited with approval and adopted in two other English cases, *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 and *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720. In *Hall's* case, it was held according to the headnote at p 241:

That although the object sought to be attained by the defendants was a perfectly reasonable one, the terms of the conditions, requiring the plaintiffs to construct an ancillary road at their own expense for the use of persons proceeding to and from adjoining properties and amounting to a requirement that the plaintiffs should in effect dedicate the road to the public without any right to compensation, there being a more regular course available under the Highways Act 1959, were so unreasonable that they were *ultra vires*.

And, in *Hillingdon*, it was held according to the headnote at pp 720–721:

That the conditions relating to occupation of the dwelling houses attached to the outline permission in the present case were the equivalent of requiring the applicants to assume at their own expense significant part of the local authority's duties as housing authority; that they were a fundamental departure from the rights of ownership and so unreasonable that no local planning authority, appreciating its duty and property applying itself to the facts, could have imposed them, and that, accordingly, they were *ultra vires*; and that, since the conditions were fundamental to the grant of planning permission, the applicants were entitled to an order of *certiorari*.

This '*Wednesbury* principle' was again adopted in *Dorset Yacht Co v Home Office* [1970] AC 1004; [1970] 2 All ER 294; [1970] 2 WLR 1140, where

A it was held that the courts could and should intervene in cases in which clearly the discretion has been exercised 'so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred'. In other words, a local authority must act in the manner which does not offend against common sense. Closer home, a similar authority would be *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, in which the dicta of Suffian LP, in the unanimous decision of the Federal Court is illuminating. The learned Lord President had this to say at p 146:

C English cases are of course decisions on the peculiar words used in the Town and Country Planning Act 1976, whereas here we are concerned with the peculiar words used in the National Land Code 1965, but nevertheless I am of the opinion that English cases afford principles that may be followed here. What are these principles? They are:

- 1 The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes.
- D 2 The conditions, to be valid, must fairly and reasonably relate to the permitted development.
- 3 The approving authority must act reasonably and planning conditions must be reasonable.
- E 4 The approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to it in the public interest.

F Applying these principles to the present case, it is plain, in my judgment, that the committee does not have the power it claims to have. The condition which the applicant objected to does not relate to the permitted development, is unreasonable, and is used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which, we are told, since the war only leases, not titles in perpetuity, are granted. However desirable this object may seem to the committee, it has no power under the law to achieve it in the way used here.

And, further down the same page he added:

- G In reconsidering these applications, the committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard of public policy, and things of that sort — things mentioned by Lord Greene MR, at p 682 in *Associated Provincial Picture House v Wednesbury Corp* [1948] 1 KB 223.
- H

I Midstream in Mr Prabha's submission (at the 11th hour, so to say) after the matter was partly heard, the defendants filed an affidavit affirmed by Kamaruddin bin Che Lah on 12 September 1995 (encl 25) raising a new issue that as the plaintiffs had, vide their letter dated 24 June 1991, proposed that the alignment of the last 20% of the monsoon drain be shifted, and the defendants had agreed to this, vide their letter dated 17 July 1991, the plaintiffs could and ought to have completed upgrading that remaining portion of the drain without clearing the squatters, had they (plaintiffs) undertaken what they had proposed. In regard to this

belated issue, it is pertinent to note that the defendants cannot deny the fact that the plaintiffs' suggestion for diversion was made perforce in the process of their attempts to have the matter settled, and the plaintiffs are entitled to sit back and do nothing at all after completing the upgrading of 80% of the monsoon drain. The suggestion by the plaintiffs was nothing more than an accommodation or expression of goodwill on their part. (See *Letchumi Ammal v Nam Fong Housing Sdn Bhd* [1982] 2 MLJ 19.) Rather than merely agreeing to the diversion, it is in the first place, the bounden duty of the defendants to make the state land available for such upgrading or improvement of the remaining affected portion of the monsoon drain. If at all, that drain is the plaintiffs' responsibility to upgrade, they cannot be forced to complete regardless of the impediments. Most importantly, this new issue does not merit any consideration, as the rough sketch of the proposed diversion of the monsoon drain pertaining to the letters dated 24 June 1991 and 17 July 1991 is extraneous and irrelevant to the amended layout plan (CAB 3), since it does not constitute any plan approved in accordance with s 25(2) of the Act.

Thus, I hold that the defendants' requirement of the condition for the issuance of OCF that the plaintiffs complete the construction of the monsoon drain on state land despite the presence of squatters to be 'so unreasonable' in the '*Wednesbury* sense', that this court can and should intervene in the plaintiffs' favour, and I so do, by allowing the plaintiffs' the declaration as prayed in prayer 4 above.

On the question of the plaintiff's second contention — the concrete perimeter drain:

After careful consideration it is my view that it is wholly impermissible in law and without any justification in fact for this court to hold that the requirement in CAB 2 pertaining to the construction of a perimeter drain should be read into or in conjunction with CAB 3. My reasons are as follows:

- (a) CAB 2 — pertaining to earthworks operations, which is an entirely different stage in the development process of a land — was approved about 2½ years before CAB 3 and under an altogether different legislation being the Street, Drainage and Building Act 1974. Due to a lapse of such long period between the respective approvals of CAB 2 and CAB 3, it would not be unreasonable for the plaintiffs to presume that CAB 2 had been deemed to be fully complied with upon approval of CAB 3 and that CAB 3 was intended to be the final and the sole reference planning permission under the Act. Alternatively, it would appear that the very approval of CAB 3 presupposes the acceptance by the defendants that the earthworks had been completed in accordance with CAB 2. Also, as it has been conceded that under the Act a planning permission or a layout plan deals, inter alia, with drains generally and of all categories of drains, indeed, here, the monsoon drain and the building drains are clearly indicated in CAB 3 — there is no valid or plausible reason why the concrete perimeter drain could not also be drawn into CAB 3.

A Consequently, its absence would indicate that such drain is not a requirement in the development of a five-storey building, though it may have been a requirement in respect of an 11-storey building (that was never built).

B Furthermore, the earthworks plan cannot complement the approved amended layout plan, as in law it is the approved amended layout plan (CAB 3) together with the conditions indorsed thereon and not the earthworks plan (CAB 2) that constitutes the planning permission. And, the nature of the plan in CAB 3 itself does not permit the construction of the purported perimeter drain, having regard to sub-division of the land concerned and the conditions imposed thereto.

C (b) The earthworks plan (CAB 2) relates to earthworks required in respect of a 11-storey building whereas CAB 3 relates to the proposed construction of a five-storey building. As such, the specification or the very requirement for a perimeter may be different in the case of a smaller building structure.

D (c) To hold that an earthworks plan could be read in conjunction or together with a layout plan, may hereafter give rise to a chaotic situation where, in the event of a situation occurring, obversely to the current case, in the two plans, a developer may probably contend that he is under no obligation to construct a perimeter drain shown in the layout plan because it is not in the earthworks plan approved earlier in time.

E (d) The very issuance of the layout plan (CAB 3) would have the effect of implicitly superseding the earthworks plan. This is a reasonable and sensible approach which the court has to take, a fortiori as, despite the defendants being clothed with sufficient and wide powers under s 22 of the Act to refuse or to impose conditions when granting planning permission, yet the defendants did not impose in CAB 3, the condition requiring the construction of a concrete perimeter drain.

F (e) The construction of the proposed concrete perimeter drain if at all, was intended to be a requirement, despite its absence in CAB 3, would create an absurdity, as such drain would run parallel along the center of the 40 ft proposed road to be constructed by the plaintiffs and the public works department.

G (f) To require that CAB 2 be read in conjunction with CAB 3, would also run foul of ss 91 and 92 of the Evidence Act 1950 and the established authorities. (See *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 and *Keng Huat Film Co Sdn Bhd v Makhanlall (Prop) Pte Ltd* [1984] 1 MLJ 243.)

H (g) There is no ambiguity or defects in CAB 3 (the layout plan), and even if there is such defect or ambiguity, s 93 of the Evidence Act 1950 would exclude extrinsic evidence to amend or explain such document. Indeed, whatever the parties may in their heart of hearts have intended, only the intentions as expressed in the CAB 3 may be

construed. (See *Goh Eng Wah v Yap Phooi Yin & Anor* [1985] 1 MLJ 329.) A

- (h) Section 70A (5) of the Street, Drainage and Building Act 1974 (as amended) is inapplicable as it was never contended that earthworks have not been completed.

- (i) Since I have held that CAB 2 cannot be read into or compliment CAB 3, I would adopt the dicta of Mohd Dzaidin J (as he then was), in *Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai, Butterworth* (incidentally the same defendants) [1990] 2 MLJ 111 at page 114H right column, who had this to say: B

Based on the above facts, in my judgment, the MPSP had no power to add, amend or go behind the conditions imposed in the layout plan once approval of the said plan was granted. C

In my opinion, that was an eminently correct approach to take; considering that a local authority has ample and wide powers under s 22(3) of the Act to impose such 'conditions as it deems fit' when granting planning permission, it would be wholly unfair and unjust to allow them to impose fresh conditions especially at the stage of issuance of OCF, and after the developer, who is essentially also an investor of the state, had already incurred considerable construction expense. Regrettably, this has happened again in the current case involving the same local council. D

For all the above reasons, I hold that the plaintiffs are under no obligations to build the concrete perimeter drain and the MPSP's requirement that this drain, which is not in CAB 3 (the layout plan), be constructed, as a condition for the issuance of an OCF is not justified in law and is ultra vires the Act. The declaration sought as in prayer 3 of the plaintiffs' claim is thus also allowed. E

As the plaintiffs have also sought damages for the considerable loss that they have incurred due to the non-issuance of OCF for so many years, I shall now have to consider the issue of the liability of public authorities in damages, an issue though very familiar in English jurisprudence is nevertheless a novel point here. F

The primary method by which the courts exercise their supervisory jurisdiction over public bodies to ensure that they observe the substantive principles of public law is by way of the application for judicial review either: G

- (a) under specialized public law procedure (viz O 53 Rules of the High Court 1980) by which the courts may grant one of the prerogative remedies of certiorari (to quash a decision), prohibition (to restrain an unlawful action) or mandamus (to compel the performance of a duty); and alternatively, or in addition, H
- (b) under private law ordinary remedies of a declaration or injunction. I

Damages may also be awarded if one of those five remedies is granted and damages would have been available if claimed in an ordinary action.

It is trite that challenges based on distinct principles of public law or general issues of law unconnected with the specific statutory code may be

A dealt with by judicial review. The courts will usually allow judicial review where an applicant raises an arguable case that a public body has acted for an improper purposes, or has acted unfairly, (see *R v IRC, ex p Preston* [1985] AC 835; [1985] 2 All ER 327; [1985] 2 WLR 836), or raises the general question to the extent to which representation can bind public bodies. (See *R v IRC, ex p MFK Underwriting Agencies* [1990] 1 All ER 91; [1990] 1 WLR 1545.) Surely, the overriding public interest would be better served with this approach taken by the English courts.

B Public bodies, like private individuals, are capable of committing tortious acts. In general, the same principles apply to public bodies as to individuals. There is also one tort, misfeasance in a public office, which applies uniquely to public bodies. A public body which commits an ultra vires act, either maliciously or knowing or where they ought to know that the act is ultra vires may be liable in tort.

C A claim for damages may be included in an application for judicial review. Such a claim can only be made in addition to a claim for the prerogative remedies or a declaration or injunction; a claim for damages cannot be made in isolation. The remedy of damages, which has always been an essential element in the protection of the citizen against public authorities, is already gaining greater prominence as a means of ensuring that powers are exercised responsibly, in good faith and with due care. This need to protect the citizen saw the birth of the concept of what might be called administrative torts.

D The court is usually sympathetic to an action for damages if the statute has no scheme of its own for penalties and enforcement; 'for, if it were not so, the statute would be but a pious aspiration'. (See *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; [1949] 1 All ER 544 (Lord Simonds); *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 at p 639; and *Booth & Co v National Enterprise Board* [1978] 3 All ER 624.)

E In public law, there is a clearer principle of liability, which depends not upon statutory interpretation but upon a general rule of law. It was stated as follows by the House of Lords in *Ferguson v Kinnoull (Earl)* (1842) 9 Cl & Fin 251 at p 280, 'When a person has an important duty to perform, he is bound to perform that duty, and if he neglects or refuses to do so, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.' Similarly, Bovill CJ said in *Pickering v James* (1873) LR 8 CP 489 at p 503, 'It is a general rule of law that, when a ministerial duty is imposed, an action lies for breach of it, without malice or negligence.' The law has traditionally been vigilant to curb those who use their position of power or dominance to obtain some advantage or to work some disadvantage. The tort of misfeasance in public office lies squarely within that tradition. The traditional and natural approach for lawyers concerned with questions of damages in administration law is to think in terms of common law remedies. Although there has been a great deal of thought given in recent decades to developing judicial control of administrative actions, 'control' has been interpreted as meaning review.

Where broad notions of public policy are applied, an award of damages in respect of certain types of activity may well be seen as an instrument of control, and where damages may not be available, as freedom from control. There is no reason why damages may not perform the function of an instrument of control of administrative action, albeit an imperfect one. A

Failure to perform the duty was commonly called nonfeasance or misfeasance. On this principle, the English Court of Appeal awarded damages for misfeasance against a local authority which failed to mark the site of a fireplug accurately, so that the delay in finding it caused the loss of the plaintiff's building. Farwell LJ said in *Dawson & Co v Bingley Urban District Council* [1911] 2 KB 149 at pp 156–157: B

The breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling any one who suffers special damage therefrom to recover such damages against the tortfeasor ... The breach of the statute is sufficient cause of action, because the tortious act, being done in breach of the statute, becomes by legal intendment an act done with intent to cause wrongful injury, just as a false and libellous statement is by legal intendment made maliciously. The act done or omitted may, apart from the statute, be innocent, or its omission may be not actionable, but the enactment makes it actionable. C D

Even where there is no ministerial duty as above, and even where no recognized tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing (see [1964] CLJ 4 (AW Bradley); [1964] PL 367 (G Ganz); (1972) 5 NZULR 105 (BC Gould); [1979] CLJ 323 (J McBride)). There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury. E F

There are now clear indications that the courts will not award damages against public authorities merely because they have made some order which turns out to be ultra vires, unless there is bad faith or malice (as judges have often called it) or conscious abuse. (See *Dunlop v Woolahra Municipal Council* [1982] AC 158; [1981] 1 All ER 1202; [1981] 2 WLR 693.) This was emphasized also in Scotland when shipowners sued the Shetland Islands Council for attempting to ban their ship from entering a harbour by denying mooring and other facilities which the council could not lawfully deny for this purpose. Since it was found that the council and the harbourmaster had acted in good faith and without malice, the claim necessary failed. (See *Micosta SA v Shetland Islands Council* [1984] 2 Lloyd's Rep 525.) G H

However, the courts have been prepared to find that there was bad faith and to award damages if an authority has manifestly and gravely disregarded the limits on the exercise of its powers with resultant loss, damages is the logical remedy for loss caused by unlawful administrative action. In *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 WLR 288, for example, a planning decision, made some time after a compulsory purchase order had been made and work had actually started, was attacked on the ground of deceit and bad faith. To quash the order or I

A grant an injunction was pointless, only damages or compensation would provide an adequate remedy. This problem frequently arises in planning cases. It is of little use to challenge the legality of the decision unless damages are available. The absence of a power to award damages places the court in an invidious position. 'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.' (See *Chaplin v Hicks* [1911] 2 KB 786 at p 792.)

B The basis of compensation in town planning lies in the notion of injurious affection rather than in compensation for administrative invalidity. The recognition that some contribution should be paid out of public funds for those who suffer loss through the operation of the legislation, whether valid (in the case of injurious affection proper) or invalid, flows from the same basic concept. Since public services operate in the interest of the community at large, it is only fair that the community which derives benefit from these services, should support the cost of compensation where the operation of a given public service causes special damage to an individual. Given the limitations of time and resources some unlawful administrative acts and decisions are inevitable. The cost of those mistakes should be borne by the community not by the individual who suffers the loss.

E It can be said that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:

- 1 If it involves the commission of a recognized tort such as trespass, false imprisonment or negligence;
- 2 if it is actuated by bad faith or malice, eg personal spite or a desire to injure for improper reasons; and
- 3 if the authority knows or ought to know that it does not possess the power to take the action in question.

G In the current case, I find that the defendants' two requirements pertaining to the completion of upgrading and construction of the monsoon drain, and the construction of the concrete perimeter drain, are requirements which, for reasons I have set out, they knew or ought to have known they did not possess the power to make, and I hold further that they have by their conduct shown bad faith in their refusal to issue OCF. (See *Judicial Remedies in Public Law* by Clive Lewis (1992), *Administrative Law* by Sir William Wade (6th Ed, 1988), *Compensation and Government Torts* by Carol Harlow (1982) and *Judicial Review of Administrative Action in the 1980s* by Micheal Taggart.)

H The requirement regarding the concrete perimeter drain may have been the upshot of an oversight on the part of the MPSP when approving the layout plan, as their own counsel has suggested. But, even the admitted facts would unfortunately leave an irresistible impression in the court's mind that rather than abiding by the layout plan that they themselves have approved, they have unseemingly attempted to rely on their administrative clout, through non-issuance of occupation certificate of fitness, to justify

what may have been misapproved. Surely, such reliance on their administrative clout is tantamount to bad faith or malice on their part.

This court cannot condone such conduct. Unwarranted use of the administrative fiat is no substitute for principles of good governance which enjoins all authorities including local authorities to implement laws, by-laws, rules and policies guided exclusively by equitable and fair principles, at all times. Surely, in a vibrant and progressive state such as Penang (though alas, not without its woes in equal measure in terms of crippling power cuts, blackouts and threatening floods — nay deluge — even in the heart of the city) — a developer is entitled to expect its local authority to exercise greater care and indeed appreciation of the contents of the plans that they approve.

In this case, the architect had issued the certificate of practical completion on 31 May 1991. The MPSP has refused to issue the OCF since. The damage and loss suffered by the developer could be considerable — this loss they have now claimed. Mindful, that such loss may have to be borne by the ratepayers of MPSP, if this court should find against the defendants, I had granted an adjournment to enable the parties to settle the matter amicably. This adjournment was to no avail when Mr JA Yeoh for the plaintiffs reported back that his clients were too aggrieved to accept the too little too late offer of the defendants.

As I have allowed the plaintiffs both the declarations sought by them, it would follow that the damages and loss that they have claimed should also, upon the facts, here, be ordered in their favour. To hold that public authorities and its officers are not liable in damages for 'administrative torts' of misfeasance in public office because such damages would have to be borne by ratepayers rather than by its officers, would be to adopt an approach rendering the clarion call on the dire need for competency and accountability in their actions to mere lip-service. This, surely, would take us further away from achieving our avowed national objectives by year 2020. Hence, I hereby, without undue hesitation, order that damages, to be assessed by the senior assistant registrar of this court, be paid by the defendants to the plaintiffs, as prayed.

Sadly, the unfortunate facts in the current case throw into sharp focus the need for not only accountability and transparency but also a sense of responsibility to govern the actions of those who administer public fund or property. Their counsel, Mr CV Prabhakaran, had fought a competent and valiant battle on their behalf to no avail, given the facts of the case.

Application allowed.

Reported by Amri bin Mohd Sham